UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

ERP Analysts, Inc. Plaintiff, v. Kenneth T. Cuccinelli II, Acting Director, United States Citizenship and Immigration Services, Defendant.	)	C/A No.: 2:19-cv-4008

COMPLAINT

Plaintiff ERP Analysts, Inc. ("ERPA") is an information technology consulting company based in Dublin, Ohio. ERPA hires qualified information technology ("IT") professionals as employees, and then places them at third-party sites that need their services. ERPA employs hundreds of individuals, a majority of which are on non-immigrant visas under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H1B Visa"). On February 20, 2018, Defendant ("USCIS") issued a binding policy memo to its adjudicators, setting new substantive rules that apply only to IT consulting companies, but it did not go through notice and comment rulemaking.

The proof is in the numbers. Before the memo, during the years of 2009 – 2017, ERPA had an overall approval rate on its H1B visas of 92%; USCIS approved 1131 of 1231 visa petitions ERPA filed. Since the memo, ERPA had an overall approval rate of 57%; USCIS approved only 287 of 506 petitions ERPA filed. ERPA's business model did not change; USCIS's rules did. ERPA now challenges three H1B Visa denials based on USCIS's new, unlawful rules promulgated in its 2018 memo.

PARTIES

1. Plaintiff ERPA Global, Inc. ("ERPA") is incorporated under the laws of Ohio with its principle place of business in Dublin, Franklin County, Ohio

2. Defendant Kenneth T. Cuccinelli II is the Acting Director of United States Citizenship and Immigration Services ("USCIS"). He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H).

VENUE AND JURISDICTION

3. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

4. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA").

5. Under the APA, this Court can set aside final agency action and compel agency action. 5 U.S.C. § 706.

6. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because ERPA and USCIS do business in Bartholomew County at their principle place of business and the Indianapolis Field Office, respectively.

8. No statute or regulation requires an administrative appeal in this case. Thus, ERPA has exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

9. USCIS's denial of ERPA's Form I129, Petition for Nonimmigrant Worker is a final agency action. 5 U.S.C. § 704.

LEGAL FRAMEWORK

H1B Visa Program

10. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill "specialty occupations." *See* 8 U.S.C. § 1184(g).

11. Specialty occupations are those that require, at a minimum, a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

12. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H1B Visa").

13. The relevant regulation identifies the following as exemplar backgrounds for specialty occupations: "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts." 8 C.F.R. § 214.2(h)(2)(ii).

14. Employers start the H1B Visa application process by filing a labor condition application with the U.S. Department of Labor ("DOL"). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

15. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers' pay and conditions.

16. The employer then signs the approved Labor Condition Application. By signing the LCA ("LCA"), the employer agrees to submit to DOL's enforcement, investigations, and administrative court system. *Id.* And only the employer that signs the LCA is subject to DOL's jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

17. After receiving an approved LCA and signing it, employers then file an I-129, Petition for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services ("USCIS").

18. The demand for Cap H1Bs is significant. For example, the chart below reflects the total number of H1B Visas filed with USCIS from 2013 to 2017:

Fiscal Year	Number of All Cap H1B Petitions Filed	Number of Cap H1B Petitions for Beneficiaries with Bachelor's Degrees	Number of Cap H1B Petitions for Beneficiaries with Advanced Degrees
2013	124,130	93,489	30,641
2014	172,581	132,063	40,518
2015	232,973	182,294	50,724
2016	236,444	166,206	70,238
2017	198,460	111,080	87,380

See Proposed Rule, Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62406, 62424 Table 7 (Dec. 3, 2018).

19. Because congress only allocated 85,000 H1B visas a year, with certain exceptions not relevant here, USCIS conducts a lottery each April to "select" 85000 petitions. *Id.* at 62411-12. This statutory pool of 85,000 H1B visas are referred to as "Cap H1B Visas."

20. Of these 85,000 visas, 65,000 Cap H1B Visas are available to foreign nationals with a college degree. *See* 8 U.S.C. § 1184(g)(1)(A)(vii). And the remaining 20,000 Cap H1B Visas are only available to foreign nationals with master's degrees or higher from a United States, non-profit institute of higher education.

21. If an employer's petition is selected in the lottery, USCIS cashes the petitioner's filing fee checks, receipts the petition, and considers its merits. If approved, a beneficiary can live and work in the United States on their Cap H1B Visa, generally, for up to 6 years. *See* 8 C.F.R.

§ 214.2(h)(15(ii)(B) ("The alien's total period of stay may not exceed six years."); 8 U.S.C. § 1184(g)(4).

22. If an employer's petition is not chosen in the Cap H1B visa lottery, the petition is returned and USCIS does not consider the merits of the petition. And the employer may not apply again for a Cap H1B until the following fiscal year's lottery, and there are no guarantees the employer will be selected in the next lottery.

23. If an employer's petition is chosen in the lottery, USCIS's then reviews the eligibility for the proposed specialty occupation's job duties and determines whether they require "theoretical and practical application of a body of highly specialized knowledge" that is on a level associated with the attainment of a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

H1B Eligibility Criteria

24. USCIS is charged with determining only whether a proffered position is a "specialty occupation."

25. Congress defined "specialty occupation" as a position that requires a certain level of education or experience:

> (1) . . . the term "specialty occupation" means an occupation that requires—
>
> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. § 1184(i).

26. USCIS has further interpreted these requirements in its regulations:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

27. A petitioner need only satisfy one of these elements to demonstrate the position is a specialty occupation.

28. In addition to this statute and regulation, in the last three years, USCIS has created various substantive rules through sub-regulatory guidance with dubious legal authority.

Specific Work Assignment Rule

29. Consistent with the Buy American Hire American Executive Order, recently, USCIS has started seeking evidence that the petitioning employer provides evidence that petitioner has

specific, Specific Work Assignments in a specialty occupation for the beneficiary for the entirety of the length of the visa.

30. While the parameters of USCIS's "Specific Work Assignment Rule" are unclear, it is clear that, if the employer cannot show consistent work for an employee for the next three years, regardless of the nature and details of such work, it cannot satisfy USCIS's Specific Work Assignment Rule.

31. But the statutory scheme rejects a requirement that the employer provide proof of specific or Specific Work Assignments for the *entirety of the duration* of the visa validity period. 8 U.S.C. § 1182(n)(2)(C)(vii).

32. In fact, § 1182(n)(2)(C)(vii) expressly allows employers to hire a foreign national with an H1B Visa and place them in a "non-productive status" (which is defined as not having enough work to perform) provided the employer continues to pay the wages required on the LCA. *Id.*

33. Importantly, congress authorized DOL, not USCIS, to oversee these worker-protection provisions through enforcement actions to compel compliance or remedy violations of the employer's attestations on the Labor Condition Application.

34. As mentioned above, an employer submits a Labor Condition Application, DOL approves it, and the employer signs it. At that moment, the employer has agreed to employ the beneficiary for the duration of the period approved—three years for most H1B Visa applications—in compliance with the terms of the Labor Condition Application. The terms of the Labor Condition Application include paying a prevailing wage during any periods of non-productive status.

35. Congress and DOL, therefore, ensure an employer will employ an employee in a specialty occupation for three years by requiring the employer to pay the worker the wage

associated with the specialty occupation for the entirety of the three-year period. Congress did not require an employer to identify specific, non-speculative work duties for three years.

36. USCIS's Specific Work Assignment Rule defies this paradigm.

37. First, nothing in 8 U.S.C. § 1184(i) indicates that Congress intended to delegate this authority to USCIS. USCIS seemingly recognizes this by trying to shoehorn its Specific Work Assignment Rule into its analysis of whether a particular position is a specialty occupation.

38. Second, USCIS tacitly recognized that a Specific Work Assignment Rule is a legislative rule, requiring notice and comment rulemaking, because it issued a notice of proposed rulemaking to enact a similar rule in 1998. *See* Proposed Rule, *Petitioning Requirements for H Nonimmigrant Classification*, 63 Fed. Reg. 30419 (June 4, 1998).

39. In the Proposed Rule USCIS proposed prohibiting hiring "temporary foreign workers to meet possible workforce needs arising from *potential business expansions or the expectation of potential new customers or contracts*." *Id.* But even under such proposed rule, USCIS would only consider whether there was work available when the petition was initially filed. *Id.* Thus, even though the proposed rule sought to preclude speculative work, it did not go nearly as far as requiring specific and Specific Work Assignments for the entire three-year duration of the visa validity period. *See id.*

40. However, on October 21, 1998, before USCIS could conclude notice and comment on this proposed rule, congress passed and the President signed the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV, Pub.L. 105-277 (October 21, 1998). ACWIA contained the "non-productive status" provision, allowing gaps in employment for H1B Visa holders but requiring H1B Visa employer to pay those workers during any such non-productive status. *See* 8 U.S.C. § 1182(n)(2)(C)(vii).

41. It is no surprise USCIS abandoned its rulemaking; Congress explicitly rejected it. Curiously, USCIS's Administrative Appeals Office continues to cite to this abandoned rulemaking as controlling legal authority to justify its demands that consulting and staffing companies provide evidence of guaranteed specific and Specific Work Assignments for the entire three years of an H-1B Visa.

42. USCIS's Specific Work Assignment Rule seeks to go further than its 1998 proposed rule and it directly conflicts with § 1182(n)(2)(C)(vii). It is therefore unlawful.

Actual Control Rule

43. Consistent with the Buy American Hire American Executive Order, recently, USCIS has started to deny H1B Visas because the petitioning employer—primarily IT consulting companies—do not have an Actual Control relationship with the foreign national worker.

44. USCIS's "Actual Control Rule" appears to be based on the following rationale: The employer petitioning for the H1B Visa does not have an Actual Control relationship with the foreign national employee because the employer will place the foreign national employee off-site at a third-party company and that third-party company, not the petitioning employer, will have actual control over the employee. Without actual control over the employee's every action, the petitioning employer cannot show an Actual Control relationship and, therefore, is not entitled to an H1B Visa.

45. This rule, however, fails to recognize that the DOL is the only agency authorized to make such a finding and it has expressly rejected this rationale because the statutes clearly delineate DOL and USCIS's separate roles in the H1B Visa process. In fact, DOL—not USCIS—has engaged in multiple rounds of notice and comment rulemaking and considered the question of whether consulting, staffing, or job contractors are proper "employers" under the H-1B program.

56 Fed. Reg. 54720-54739, October 22, 1991; 57 Fed. Reg. 1316-1338, January 13, 1992; 59 FR 65646, December 20, 1994.

46. Each time, DOL has determined that IT consulting companies are employers even if they place all its employees at off-site locations for third-party companies. *Id.*

47. DOL's authority to determine whether a company is an employer for purposes of an H1B Visa is located in 8 U.S.C. §§ 1182(n) & (p).

48. DOL may not issue an approved Labor Condition Application to anyone other than an "employer." *See* 8 U.S.C. § 1182(n)(1)(A).

49. Neither § 1182(n) nor any other statute gives USCIS authority, joint with DOL or individually, to address this question or to disagree with DOL's determination.

50. USCIS's whole reliance on DOL for this determination can even be found in USCIS's interpretation of the controlling statutes manifested in their regulations.

51. USCIS has a definition of "employer" in its regulation. 8 C.F.R. § 214.2(h)(4)(ii) but it was copied, verbatim, from DOL's regulation that was designed to explicitly allow consulting, staffing, and job contracting companies. 20 C.F.R. § 655.715 (1991-1997), 56 Fed. Reg. 54720-54739 (Interim Rule).[1]

52. In light of the DOL's exclusive statutory and regulatory authority over the determination of who is an H1B employer and USCIS's prior recognition of such exclusive authority, USCIS's current Actual Control Rule is unlawful.

[1] It cannot be disputed that the rulemaking where USCIS adopted DOL's definition of employer was for the limited purpose of explaining that H1B employer petitioners must have a physical location in the United States. 56 Fed. Reg. 61111-61121, December 2, 1991 ("In order to provide clarification, the Service has included a definition of the term "United States employer" in the final rule").

FACTS

53. ERPA is an IT consulting company based in Dublin, Ohio.

54. To this end, ERPA places its employees at third party company sites to perform complex, IT services.

55. ERPA has the right to control all of its employees. It has the right to hire, fire, and pay all of its employees.

56. ERPA has used H1B visas for years. The chart below demonstrates how many Initial Applications, Initial Denials, Continuing Approvals, and Continuing Denials ERPA has filed and received from USCIS from 2009 to present:

Fiscal Year	Employer	Initial Approvals	Initial Denials	Continuing Approvals	Continuing Denials
2009	ERP ANALYSTS INC	5	3	26	4
2010	ERP ANALYSTS INC	6	0	47	1
2011	ERP ANALYSTS INC	13	2	87	2
2012	ERP ANALYSTS INC	25	2	65	2
2013	ERP ANALYSTS INC	27	0	67	0
2014	ERP ANALYSTS INC	0	0	1	0
2014	ERP ANALYSTS INC	25	4	101	1
2015	ERP ANALYSTS INC	43	1	120	4
2015	ERP ANALYSTS INC	0	0	1	0
2016	ERP ANALYSTS INC	73	2	209	12
2017	ERP ANALYSTS INC	0	0	1	0
2017	ERP ANALYSTS INC	24	2	165	58
2018	ERP ANALYSTS INC	6	41	165	108

2019	ERP ANALYSTS INC	0	0	0	1
2019	ERP ANALYSTS INC	9	24	107	43

"Initial" approvals and denials relate to a first-time H1B Visa application. A "continuing" approval or denial relates to an H1B Visa application on behalf of a beneficiary who already received an initial H1B visa. These are either extensions for existing employees or transfer applications for new employees who received their H1B Visas through a different employer.

57. From 2009 to 2017, ERPA's overall approval rate was 92%. Its approval rate for initial applications was 94% and its approval rate for continuing applications was 91%.

58. From 2018 to present, ERPA's overall approval rate was 57%. Its approval rate for initial applications was 18% and its approval rate for continuing applications was 64%.

59. ERPA did not change its business model.

60. During 2018 and 2019, ERPA applied for H1B visas for Rakesh Kusuma (WAC1917350265), Vasanth Narayanan (WAC1905750759), and Anita Sundaram (WAC1917754108).

61. USCIS denied ERPA's initial H1B Visa petitions on behalf of Mr. Narayanan and Ms. Sundaram based on both its Actual Control Rule and its Specific Work Assignment Rule. It denied ERPA's initial H1B Visa petitions on behalf of Mr. Kusuma based on its Specific Work Assignment Rule alone.

62. Both of these rules are unlawful.

63. Based on these denials, ERPA will lose Cap H1B visa petitions numbers. Because there are a limited number of new H1B visas available each year, USCIS re-allocates the H1B Visa

number to a different petitioner if the H1B Visa petition is selected in the H1B Visa lottery but later denied.

64. Based on these denials, ERPA will lose the H1B Visa numbers associated with these three H1B Visa petitions, and there is no guarantee that USCIS will pick these petitions in a subsequent lottery. This harm is irreparable.

65. ERPA also suffers financial harm from applying for an H1B Visa when that petition is selected in the lotter but later denied. ERPA pays approximately $6800 in filing fees for each application. ERPA also pays attorneys' fees for each application. ERPA will lose this money based on the challenged denials and it is unable to sue USCIS for money damages. This financial harm is irreparable.

66. Finally, the beneficiaries of these visa petitions risk losing their immigration status and their work authorization due to these denials. Courts have recognized harm to immigration status as irreparable harm.

FIRST CAUSE OF ACTION
(APA - the Denial is Arbitrary and Capricious)

67. ERPA re-alleges all facts herein.

68. USCIS's denials are final agency actions that aggrieved ERPA. 5 U.S.C. § 704.

69. USCIS's denials are based on its Specific Work Assignment Rule and Actual Control Rule

70. USCIS's denial violates the APA because its bases—Specific Work Assignment Rule and the Actual Control rule—are *ultra vires* and, therefore, the denials are in excess of statutory jurisdiction, authority, or limit. 5 U.S.C. § 706(2)(C).

71. USCIS's denial violates the APA because its basis—Specific Work Assignment Rule and the Actual Control rule—constitute legislative or substantive rules that did not go through notice

and comment rulemaking and, therefore, the denials are without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

72. USCIS's denial violates the APA because its basis—the Specific Work Assignment Rule—is arbitrary and capricious as it contradicts § 1182(n)(2)(C)(vii) and DOL's approval of the Labor Condition Application finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

73. USCIS's denial violates the APA because its basis—the Specific Work Assignment Rule—is arbitrary and capricious as the ERPA provided sufficient evidence in its H1B Visa application to prove specific, non-speculative work and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

74. USCIS's denial violates the APA because its basis—the Specific Work Assignment Rule—violates the ERPA's freedom to contract under the United States constitution and, therefore, is contrary to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

75. USCIS's denial violates the APA because its basis—the Actual Control Rule—constitutes a legislative rule that did not go through notice and comment rulemaking and, therefore, the denial is without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

76. USCIS's denial violates the APA because its basis—the Actual Control Rule—is arbitrary and capricious as it contradicts DOL's employer finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

77. USCIS's denial violates the APA because its basis—the Actual Control Rule—is arbitrary and capricious as the Plaintiff provided sufficient evidence in its H1B Visa application

to prove an Actual Control relationship and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

78. USCIS's denial violates the APA because its basis—the Actual Control Rule—violates the Plaintiff's freedom to contract under the United States constitution and, therefore, is contrary to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

79. Similarly, to the extent these rules are lawful, as applied, the denial is arbitrary and capricious. A final agency action is arbitrary and capricious where:

> USCIS has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before USCIS, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

80. The three denials are arbitrary and capricious because the denials run counter to the evidence in the record as ERPA provided sufficient evidence to satisfy USCIS's Specific Work Assignment Rule and its Actual Control Rule.

81. Finally, until ERPA acquires the certified administrative record, it will be unable to identify all claims of error; ERPA expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

82. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, declare ERPA's proffered position as a specialty occupation, instruct it to re-adjudicate the H1B Visa application without applying the Specific Work Assignment Rule or the Actual Control Rule

PRAYER FOR RELIEF

ERPA, therefore, prays that this Court enter the following relief:

1. Take jurisdiction over this case;

2. Declare USCIS's Specific Work Assignment Rule and its Actual Control Rule as substantive or legislative rules that did not go through notice and comment rulemaking and, therefore, invalid;

3. Declare USCIS's Specific Work Assignment Rule unlawful or arbitrary and capricious;

4. Declare USCIS's Actual Control Rule unlawful or arbitrary and capricious;

5. Declare USCIS's denials violative of the Administrative Procedure Act;

6. Remand this case to USCIS with instructions to re-adjudicate these cases in compliance with the above declarations within 15 calendar days;

7. Grant all relief that is necessary and proper; and

8. Award attorneys' fees and costs under the Equal Access to Justice Act or any other provision of law.

September 12, 2019

Respectfully Submitted,

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